Even if the defendants were agents or independent contractors of the carriers, the defendants cannot rely on the terms of the bill of lading as none of the four factual prerequisites laid down by Lord Reid in *Midland Silicones Ltd.* v. *Scruttons Ltd.*[1] are met in this case.

Lord Reid in his judgment said (p. 374):

"I can see a possibility of success of the agency argument if (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore that these provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome. And then to affect the consignee it would be necessary to show that the provisions of the Bills of Lading Act, 1855, apply."

The next question at issue is whether the loss and damage to the goods arose out of the defendants' negligence.

The fact that the goods were discharged into the defendants' lighter is not in dispute. I find on the evidence that the goods were discharged from the ship into the lighter in apparent good order and condition. I also find that when the goods were discharged from the lighter they were not in the same order and condition but were short-delivered and damaged to the extent specified in the Survey Reports of Messrs. Ritchie & Bisset (Exhibits P1 and P2). There is no doubt that the loss and damage occurred during the five days that the goods were in the defendants' lighter.

The onus is on the defendants to show that the loss or damage did not happen in consequence of their neglect to use such care and diligence as a prudent or careful man would exercise in relation to his own property. This the defendants have failed to do.

The plaintiffs have established their case and are entitled to succeed in this case for the full amount. There will be judgment for the plaintiffs in the sum of $18,223.17 and costs.

Claim allowed.

Solicitors: *Godwin & Co.; Netto, Low & Partners.*

MALAYSIAN REPORTS

JAYARAMAN & ORS. v. PUBLIC PROSECUTOR

[F.C. (Suffian L.P., Abdul Hamid & Ajaib Singh JJ.)
May 3 & June 10, 1982]
[Kuala Lumpur – Federal Court Criminal Reference No. 4 of 1981]

Criminal Law and Procedure – Charge of culpable homicide not amounting to murder – What constitutes arrest – Oral statement made by accused before his arrest to a police officer of or above rank of Inspector – Whether admissible – Circumstantial evidence – Whether burden on prosecution heavier than in case of direct evidence – Criminal Procedure Code, ss. 15, 112 & 113.

Evidence – Circumstantial Evidence – Whether burden on prosecution heavier than in case of direct evidence – Statement made by an accused to police officer – When admissible – Criminal Procedure Code, ss. 112 & 113.

In this case the appellants had been convicted of the offence of culpable homicide not amounting to murder and sentenced to various terms of imprisonment. Their appeals to the High Court were dismissed – See [1982] 2 M.L.J. 273. On their application the learned Judge reserved for the decision of the Federal Court the following questions of law of public interest which had arisen in the course of the trial and the determination of which by the learned judge had affected the event of the appeal:

1. Whether it is correct law that in dealing with a case which relies on circumstantial evidence it does not make any difference if a court finds that in considering all the evidence it is satisfied beyond reasonable doubt that the accused is guilty of the offence *or* if the court says that the evidence points only to the irresistible conclusion that the accused is guilty.
2. Whether compliance by any person to a request by a police officer not to leave a prescribed place constitutes submission to custody by that person within the meaning of section 15 of the Criminal Procedure Code.
3. Whether an oral statement made by a person before his arrest to a police officer of or above the rank of Inspector can be admitted as evidence against him where such statement has not been reduced into writing.

Held: (1) in a case tried without a jury and depending on circumstantial evidence, it is enough for the trial judge to remember only that the prosecution need prove its case beyond reasonable doubt and failure by him to also say that the circumstances are not only consistent with the accused having committed the crime but also such that they are inconsistent with any other reasonable explanation is not fatal. In other words, in a case depending on circumstantial evidence it is enough if the court merely says that it is satisfied of the accused's guilt beyond reasonable doubt, without further saying that the facts proved irresistibly point to one and only one conclusion, namely the accused's guilt;

(2) the answer to the second question referred to the court in this case depends on the facts of each individual case, but on the facts in the case it could not be said that the applicants had been arrested by the corporal when he told them to wait and not to leave the temple, for he had merely stopped them to make inquiries into the attack on the temple;

(4) an oral statement made by a person before his arrest to a police officer of or above the rank of Inspector can be admitted in evidence against him where the statement has not been reduced to writing, provided there is a reasonable explanation for the failure.

Cases referred to:–

(1) *McGreevy* v. *Director of Public Prosecutions* [1973] 1 W.L.R. 276; [1973] 1 All E.R. 503.
(2) *Kartar Singh & Anor.* v. *Public Prosecutor* [1952] M.L.J. 85.
(3) *Idris* v. *Public Prosecutor* [1960] M.L.J. 296.
(4) *Chan Chwen Kong* v. *Public Prosecutor* [1962] M.L.J. 307.
(5) *Sunny Ang* v. *Public Prosecutor* [1966] 2 M.L.J. 195.
(6) *Karam Singh* v. *Public Prosecutor* [1967] 2 M.L.J. 25.
(7) *Chang Kim Siong* v. *Public Prosecutor* [1968] 1 M.L.J. 36.

(8) *Muniandy* v. *Public Prosecutor* [1973] 1 M.L.J. 179.
(9) *Reg.* v. *Hodge* (1838) 2 Lewin 227.
(10) *Barca* v. *The Queen* (1975) 133 C.L.R. 82.
(11) *Police* v. *Pereira* [1977] 1 N.Z.L.R. 547.
(12) *Eng Sin* v. *Public Prosecutor* [1974] 2 M.L.J. 168. 168.
(13) *Plomp* v. *The Queen* (1963) 110 C.L.R. 234.
(14) *Martin* v. *Osborne* (1936) 55 C.L.R. 367.
(15) *Kamis* v. *Public Prosecutor* [1975] 1 M.L.J. 46.
(16) *Lim Foo Yong* v. *Public Prosecutor* [1976] 2 M.L.J. 259.
(17) *Shaaban & Others* v. *Chong Fook Kam & Anor.* [1969] 2 M.L.J. 219.
(18) *Abdul Ghani bin Jusoh* v. *Public Prosecutor* [1981] 1 M.L.J. 25.

[The following cases were also cited in argument:– *Uttar Pradesh State* v. *Deoman and A.G. of India* A.I.R. 1960 S.C. 1125, 1131; *Pakala Narayana Swami* v. *King Emperor* [1939] 66 I.A. 66, 68]

FEDERAL COURT

D.P. Vijandran (*Chandran G. Nair and Murthy* with him) for the applicants.

Mokhtar Abdullah (Deputy Public Prosecutor) for the respondent.

Suffian L.P. (delivering the Judgment of the Court): Some Malays went one night to destroy idols in a Hindu temple in Kerling. Some Indians had been expecting the attack and were guarding the temple, and as a result there was a fight. Four of the Malays were killed and the eight applicants were convicted in the Sessions Court, Klang, under sections 304 and 34 of the Penal Code and sentenced to various terms of imprisonment. Their appeals to the High Court were dismissed and on their application the learned Judge who heard the appeal (Syed Othman, F.J.), acting under section 66(1) of the Courts of Judicature Act, reserved for our decision the following questions of law of public interest which had arisen in the course of the appeal and the determination of which by the learned Judge had affected the event of the appeal:

1. Whether it is correct law that in dealing with a case which relies on circumstantial evidence it does not make any difference if a court finds that in considering all the evidence it is satisfied beyond reasonable doubt that the accused is guilty of the offence *or* if the court says that the evidence points only to the irresistible conclusion that the accused is guilty.
2. Whether compliance by any person to a request by a police officer not to leave a prescribed place constitutes submission to custody by that person within the meaning of section 15 of the Criminal Procedure Code.
3. Whether an oral statement made by a person before his arrest to a police officer of or above the rank of Inspector can be admitted as evidence against him where such statement has not been reduced into writing.

Question 1

Mr. Vijandran submits that the answer to this question is that it is not correct – meaning that in a case depending on circumstantial evidence the conviction cannot stand if the court merely says that the prosecution case has been proved beyond reasonable doubt; the court must go further and say that the facts proved irresistibly point to one and only one conclusion, the guilt of the accused. Encik Mokhtar on the contrary submits that it is correct – meaning that it is enough if the court merely says that it is satisfied of the guilt of the accused beyond reasonable doubt without further saying that the facts proved irresistibly point to one and only one conclusion, the guilt of the accused.

With respect we agree with Encik Mokhtar, following the House of Lords decision in *McGreevy* v. *Director of Public Prosecutions*[1], and thus modifying the ruling of this court in several local cases which seems to lay a heavier burden of proof on the prosecution where it depends on circumstantial evidence than where it depends on direct evidence.

Some of these local cases are mentioned by Professor Ahmad Ibrahim in a note on Circumstantial Evidence at [1973] 1 M.L.J. xlvi and they are *Kartar Singh & Anor.* v. *Public Prosecutor*[2], *Idris* v. *Public Prosecutor*[3], *Chan Chwen Kong* v. *Public Prosecutor*[4], *Sunny Ang* v *Public Proescutor*[5], *Karam Singh* v. *Public Prosecutor*[6], *Chang Kim Siong* v. *Public Prosecutor*[7] and *Muniandy* v. *Public Prosecutor*[8]

In *Kartar Singh*[2], the appellants had been convicted of the offence of culpable homicide not amounting to murder. Murray-Aynsley C.J. in giving the judgment of the Singapore Court of Criminal Appeal brought out the difference between the effect of direct and circumstantial evidence. Allowing the appeal, he said:

"The case against the appellants was put carefully and accurately to the jury. We consider however that this is one of the cases in which the evidence even if believed, did not constitute proof of the guilt of either of the appellants. Here it is necessary to distinguish between the effect of direct and circumstantial evidence. Where there is direct evidence, however slight, the jury are entitled to accept it and the case should be left to them to decide. In the case of circumstantial evidence the position is different. Here the evidence must be such that, if it is believed there is no reasonable alternative to the guilt of the accused. If there is anything less than this it is no case at all."

In *Idris* v. *Public Prosecutor*[3], the appellant had been convicted of the murder of his ex-wife. Except for certain evidence with regard to motive, the case for the prosecution consisted entirely of circumstantial evidence. In his summing-up the learned trial judge had said:–

"With regard to the definition of circumstantial evidence I can give you no better definition than quote to you the words of Lord Cairns in the case of *Belhaven & Stenton Peerage* reported in L.R. 1 App. Cas. 278, at p. 279 –

'My Lords, in dealing with circumstantial evidence we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But on the other hand you may have a number of rays, each of them insufficient, but all converging and brought to bear upon the same point, and, when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel.' In other words circumstantial evidence consists of this: that when you look at all the surrounding circumstances, you find such a series of undesigned, unexpected circumstances that, as a reasonable person, you find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps, then it is no use at all."

On appeal, the Court of Appeal held that the learned trial judge had dealt fully in his summing-up with the onus of proof and with the principle of reasonable doubt. The jury could have been in no doubt how they should

properly consider and arrive at their verdict and therefore there were no grounds for saying that their final verdict was unreasonable.

In *Chan Chwen Kong* v. *Public Prosecutor*[4] the appellant was convicted of the murder of a woman and her child. The evidence against the appellant was entirely circumstantial and this was one of the grounds of appeal. Thomson C.J., as he then was, in giving the judgment of the Court of Appeal said,

"That evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong enough to sustain the conviction. That is very true. It must however be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to form a rope. The real question is: is that rope strong enough to hang the prisoner?"

In the Singapore case of *Sunny Ang* v. *Public Prosecutor*[5] the appellant had been convicted of murder. One of the matters relied on at the hearing of the appeal was that the learned trial judge had erred in law in failing adequately to direct the jury on the danger of convicting an accused person upon circumstantial evidence. In his summing up the learned trial judge had said –

"The second question to which I must draw your attention is that the question in this case, depending as it does on circumstantial evidence, is whether the cumulative effect of all the evidence leads you to the irresistible conclusion that it was the accused who committed this crime, or is there some reasonably possible explanation, such, for example – 'Was it an accident?'"

Later he said:–

"Now, as I told you earlier, one of the points about circumstantial evidence is its cumulative effect. Any one of these points taken alone might, you may think, be capable of explanation. The question for you is: where does the totality of them, the total effect of them all, lead you to? Adding them together, considering them not merely each one in itself, but altogether, does it or does it not lead you to the irresistible inference and conclusion that the accused committed this crime? Or is there some other reasonably possible explanation of those facts?

The prosecution case is that the effect of all the evidence drives you irresistibly and inexorably to the one conclusion and one conclusion only: that it was the accused who intentionally caused the death of this young girl."

It was held in the Federal Court that those directions were perfectly adequate in a case where the prosecution was relying on circumstantial evidence.

In the case of *Karam Singh* v. *Public Prosecutor*[6] the appellant appealed against his conviction for murder. There was no eyewitness of the attack on the deceased; the prosecution case was based entirely on circumstantial evidence. Ong Hock Thye F.J., as he then was, in giving the judgment of the Federal Court said:

"In a case where the prosecution relies on circumstantial evidence, such evidence must be inconsistent with any other hypothesis than that of the guilt of the accused."

In *Chang Kim Siong* v. *Public Prosecutor*[7] the appellant appealed against his conviction for murder. The evidence against the appellant was circumstantial and Pike C.J. (Borneo) in giving the judgment of the Federal Court allowing the appeal said,

"The onus on the prosecution where the evidence is of a circumstantial nature is a very heavy one and that evidence must point irresistibly to the conclusion of the guilt of the accused. If there are gaps in it, then it is not sufficient."

In *Muniandy* v. *Public Prosecutor*[8] where the appellant was charged with rape, it appeared that the only evidence which could corroborate the evidence of the complainant was circumstantial evidence. The appellant was convicted and he appealed to the Federal Court. Ong C.J. in giving the judgment of the Federal Court allowing the appeal said:–

"Wherever circumstantial evidence is relied on by the prosecution in building up its case against an accused person, any such piece of evidence must tend only in one direction, that is to say, suggest or lend support to an inference of guilt. This evidence – if capable of an innocent interpretation or ambiguous as being equally consistent with guilt or innocence – should never be pleaded before the jury as circumstantial evidence strengthening the prosecution case. Any summing-up which falls to explain this intelligibly to the jury is a serious misdirection. All the more so where in the instant case, circumstantial evidence more consistent with innocence than guilt was represented to the jury as corroboration of the complainant's evidence. On the other hand, where the circumstantial evidence is seen to be strongly in favour of the defence, a proper trial requires that, in the interests of justice, this fact be brought to the notice of the jury and not passed over as an irrelevant detail."

Thus it will be seen from the above that in a trial with a jury here and in Singapore it has been consistently held that where the prosecution depends on circumstantial evidence it is not enough to direct them simply that the prosecution has to prove its case beyond reasonable doubt; but the judge must go further and direct the jury that the burden on the prosecution is heavier than where it depends on direct evidence and that is that the evidence to justify a conviction must irresistibly point to one and only one conclusion and that is the guilt of the accused.

The last of the local cases cited above was decided by this court on February 12, 1973. Bench and Bar were then unaware that 11 days earlier the House of Lords had given judgment on a similar point in *McGreevy* v. *Director of Public Prosecutor*[1]. There the Court of Criminal Appeal of Northern Ireland had certified that the case involved a point of law of general public importance and granted leave to appeal to the House of Lords. The point of law so certified was as follows:–

"Whether at a criminal trial with a jury, in which the case against the accused depends wholly or substantially on circumstantial evidence, it is the duty of the trial judge not only to tell the jury generally that they must be satisfied of the guilt of the accused beyond reasonable doubt, but also to give them a special direction by telling them in express terms that before they can find the accused guilty they must be satisfied not only that the circumstances are consistent with his having committed the crime but also that the facts proved are such as to be inconsistent with any other reasonable conclusion."

Reliance was placed upon the report of the case of *Reg.* v. *Hodge*[9]. The accused in that case was charged with murder and the trial took place in 1838 at the Assizes in Liverpool. Alderson B. said in summing-up to the jury that the case was "made up of circumstances entirely" and that before they could find the prisoner guilty they must be satisfied – "not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other material conclusion than that the prisoner was the guilty person."

In *McGreevy*[1] the House of Lords rejected the contention that there is a special obligation upon the judge where the case against the accused depended wholly or

substantially on circumstantial evidence. Lord Morris of Borth-Y-Gest with whom the other Law Lords agreed said:–

"In my view the basic necessity before guilt of a criminal charge can be pronounced is that the jury are satisfied of guilt beyond a reasonable doubt. This is a conception that a jury can readily understand and by clear exposition can readily be made to understand. So also can a jury readily understand that from one piece of evidence which they accept various inferences might be drawn. It requires no more than ordinary common sense for a jury to understand that if one suggested inference from an accepted piece of evidence leads to a conclusion of guilt and another suggested inference to a conclusion of innocence, a jury could not on that piece of evidence alone be satisfied of guilt beyond reasonable doubt, unless they wholly rejected and excluded the latter suggestion. Furthermore a jury can fully understand that if the facts which they accept are consistent with guilt but also consistent with innocence they could not say that they were satisfied of guilt beyond all reasonable doubt. Equally a jury can fully understand that if a fact which they accept is inconsistent with guilt or may be so they could not say that they were satisfied of guilt beyond all reasonable doubt.

In my view it would be undesirable to lay it down as a rule which would bind judges that a direction to a jury in cases where circumstantial evidence is the basis of the prosecution case must be given in some special form, provided always that in suitable terms it is made plain to a jury that they must not convict unless they are satisfied of guilt beyond all reasonable doubt ...

To introduce a rule as suggested – would in my view not only be unnecessary but would be undesirable. In very many criminal cases it becomes necessary to draw conclusions from some accepted evidence. The mental element in a crime can rarely be proved by direct evidence. I see no advantage in seeking for the purpose of a summing up to classify evidence into direct or circumstantial with the result that if the case for the prosecution depends (as to the commission of the act) entirely on circumstantial evidence (a term which would need to be defined) the judge becomes under obligation to comply when summing up with a special requirement. The suggested rule is only to apply if the case depends "entirely" on such evidence. If the rule is desirable why should it be so limited? And how is the judge to know what evidence the jury accept? Without knowing this how can he decide whether a case depends entirely on circumstantial evidence? If it were to apply not only when the prosecution case depends entirely on circumstantial evidence but also if "any essential ingredient" of the case so depends there would be a risk of legalistic complications in a sphere where simplicity and clarity are of prime importance. In agreement with the Court of Criminal Appeal I would reject the contention that there is a special obligation upon a judge in the terms of the proposition. There should be no set formulae which must be used by a learned judge. In certain types of cases there are rules of law and practice which require a judge to give certain warnings though not in a compulsory wording to a jury. But in the generality of cases I see no necessity to lay down a rule which would confine or define or supplement the duty of a judge to make clear to a jury in terms which are adequate to cover the particular features of the particular case that they must not convict unless they are satisfied beyond reasonable doubt."

Thus, as correctly stated by the headnote to the case, in the judgment of the House of Lords, in a criminal trial it is the duty of the judge to make clear to the jury in terms which are adequate to cover the particular features of the case that they must not convict unless they are satisfied beyond reasonable doubt of the guilt of the accused; and there is no rule that, where the prosecution case is based on circumstantial evidence, the judge must, as a matter of law, give a further direction that the facts proved are not only consistent with the guilt of the accused, but also such as to be inconsistent with any other reasonable conclusion.

Over two years later *McGreevy*[1] was considered by the High Court of Australia in *Barca* v. *The Queen*[10], a criminal case dependent on circumstantial evidence, and that court decided to adhere to the old principle that the jury cannot return a verdict of guilty unless the circumstances are such as to be inconsistent with any reasonable hypothesis other than guilt. At page 105 Gibbs J., as he then was, Stephen J. and Mason J. however said:–

"That decision goes only to the form necessary to be given to the jury, ... it does not reflect upon the correctness of the principles stated, which are really principles of logic and common sense."

In 1976 it was the turn of a Judge of the New Zealand Supreme Court to consider *McGreevy*[1]. This was in *Police* v. *Pereira*[11] where Mahon J. said that it was for the New Zealand Court of Appeal to decide whether *McGreevy*[1] should be followed in New Zealand and he himself felt obliged in the meantime to follow *R.* v. *Hodge*[9] in the same way as it had been followed by New Zealand courts.

He respectfully suggested (page 554) that in a case involving a combination of direct and circumstantial evidence, there was no scope for the *R.* v. *Hodge*[9] direction and that such a direction was only appropriate where the case against the accused depended on circumstantial evidence alone. He added that apart from this,

"*McGreevy* v. *Deputy Public Prosecutor*[1] was restricted to the form of direction which should be given to a jury. I can see no immediate justification for applying that case to a situation in which a criminal trial is conducted without a jury, as occurs in a Magistrate's Court.

In the latter circumstances it is my opinion that a magistrate, with his trained judicial mind, should apply the logical process, in a case wholly depending on circumstantial evidence, of seeing whether on all the proved facts there is any reasonable hypothesis open which is inconsistent with the guilt of the accused."

With respect it seems to us that this is another way of saying that the prosecution must prove its case beyond reasonable doubt – applying that test too, the magistrate must acquit if on the proved facts there is a reasonable hypothesis open which is inconsistent with the guilt of the accused – for in that case, it cannot be said that his guilt has been proved beyond reasonable doubt.

We now turn to Malaysian decisions after *McGreevy*[1] In a further note on that case Professor Ahmad Ibrahim mentions at [1974] 2 M.L.J. xxxiii two cases which show that this court still continues to seemingly require a heavier burden on the prosecution where the evidence is circumstantial than that of proof beyond reasonable doubt, although in one of them express reference was made to *McGreevy*[1].

In *Eng Sin* v. *Public Prosecutor*[12] on a charge of murder the trial judge had indicated to the jury that "there was no direct evidence in the sense that the prosecution have not produced witnesses to say they saw someone attacking the deceased. But in law a fact can be proved by indirect evidence or circumstantial evidence which can show who was the person who did it." Later the learned trial judge had said, "Although there is no direct evidence, I think there is circumstantial evidence – and it is said that circumstantial evidence can have the accuracy of mathematics." The Federal Court held that the direction to the jury was inadequate. Reference was made to the English case, *Hodge*[9], and to the Australian cases of *Plomp.* v. *The Queen*[13] and *Martin* v. *Osborne*[14] but although reference was also made to *McGreevy*[1], the remarks of Lord Morris of Borth-Y-Gest about *Hodge's* case[9] were

not mentioned. In *McGreevy*[1] Lord Morris of Borth-Y-Gest had said:—

"The singular fact remains that here in the home of the Common Law *Hodge's* case has not been given very special prominence; references to it are scant and do not suggest that it enshrines guidance of such compulsive power as to amount to a rule of law which if not faithfully followed will stamp a summing-up as defective. I think this is consistent with the view that *Hodge's* case was reported not because it laid down a new rule of law but because it was thought to furnish a helpful example of one way in which a jury could be directed in a case where the evidence was circumstantial."

In *Eng Sin* v. *Public Prosecutor*[12] the Federal Court cited the view of Lord Morris of Borth-Y-Gest that:—

"It would be undesirable to lay it down as a rule which would bind judges that a direction to a jury in cases where circumstantial evidence is the basis of the prosecution case must be given in some special form, provided that in suitable terms it is made plain to a jury that they must not convict unless they are satisfied of guilt beyond reasonable doubt."

At the same time the Federal Court cited the case of *Karam Singh* v. *Public Prosecutor*[6] where the Federal Court had said:—

"In a case where the prosecution relies on circumstantial evidence, such evidence must be inconsistent with any other hypothesis than that of the guilt of the accused."

In *Kamis* v. *Public Prosecutor*[15] the learned trial judge on a charge of murder had told the jury "for a court to rely on circumstantial evidence the evidence when considered must point only to the guilt of the accused; it must not be capable of any other interpretation or any other meaning." This direction was approved by the Federal Court.

In *Lim Foo Yong* v. *Public Prosecutor*[16] Chang Min Tat J. as he then was, allowing an appeal from the Sessions Court applied the test laid down in *Karam Singh*[6].

In *McGreevy*[1] Lord Morris of Borth-Y-Gest had also referred to the decision of Dixon C.J. in *Plomp* v. *The Queen*[13] where he cited *Martin* v. *Osborne*[14] and pointed out that in *Plomp* v. *The Queen*[13] Menzies J. said that the customary direction was not something separate and distinct from the direction that the prosecution must prove its case beyond reasonable doubt, and that the giving of the particular direction stemmed from the more general requirement that proof must be established beyond reasonable doubt. It may also be noted that Lord Morris of Borth-Y-Gest quoted with approval the following passage from *Kenny's* Outline of Criminal Law:

"No distrust of circumstantial evidence has been shown by English law. It does not even require that direct evidence shall receive any preference over circumstantial."

In our view the irresistible conclusion test only *seems* to place on the prosecution a higher burden of proof than in a case where it depends on direct evidence, for in fact to apply the one and one only irresistible conclusion test is another way of saying that the prosecution must prove the guilt of the accused beyond reasonable doubt.

As Syed Othman F.J., said in the instant case this is only a "play on words". If the facts proved point to a reasonable alternative to the guilt of the accused, that is only another way of saying that there is a doubt in the prosecution case and so the prosecution has not proved its case beyond reasonable doubt. Similarly if the facts proved show some reasonably possible explanation, for example an accident, or if they are inconsistent with any other hypothesis than that of the guilt of the accused or if they are capable of an innocent interpretation or if they are ambiguous as being equally consistent with guilt or innocence. In all these cases the facts proved do not point to the guilt of the accused, the trial court is or cannot be sure that the accused is guilty and must acquit — because the prosecution has not proved its case beyond reasonable doubt.

We respectfully agree with what Menzies J., said in the Australian case already cited *Plomp* v. *The Queen*[13] that the customary direction to a jury was not something separate and distinct from the direction that the prosecution must prove its case beyond reasonable doubt, and that the giving of the particular direction stemmed from the more general requirement that proof must be established beyond reasonable doubt.

So in a case tried without a jury and depending on circumstantial evidence, in our judgment, respectfully following *McGreevy*[9], it is enough for the trial judge to remember only that the prosecution need prove its case beyond reasonable doubt, and failure by him to also say that the circumstances are not only consistent with the accused having committed the crime but also such that they are inconsistent with any other reasonable explanation, is not fatal. In other words, we agree with Encik Mokhtar that the answer to question 1 is yes, it is correct — meaning that in a case depending on circumstantial evidence it is enough if the court merely says that it is satisfied of the accused's guilt beyond reasonable doubt, without further saying that the facts proved irresistibly point to one and only one conclusion, namely the accused's guilt.

In the instant case the learned President of the Sessions Court said that the evidence led him to the "inescapable conclusion" that the applicants it was who attacked and killed the intruders. In our view the expression "inescapable conclusion" clearly indicates that he used the irresistible-conclusion test.

Question 2

Mr. Vijandran submits that the answer to this question should be yes, while Encik Mokhtar submits that the question is one of fact, not one of law, let alone one of law of public importance and that therefore the court should decline to answer it.

The facts on which this question is founded are as follows. Two Indians came to the Police Station at Kerling at about 3.05 a.m. on August 19, 1978, and reported that five men had attacked the temple, that there was a fight between them and the temple guards and that the attackers had been surrounded. Corporal Abdul Ghani went to the temple with the Indians and there he saw the eight applicants and the priest of the temple. He told them not to leave the place. A.S.P. Jamaluddin arrived at the temple at 3.35 a.m. and questioned the applicants. Their replies to the A.S.P. became an issue as regards admissibility, it being contended that they had been arrested when the Corporal told them not to leave the temple and they had not been cautioned before they gave their replies and therefore their replies were not admissible.

The learned Judge held that they had not been arrested

then and therefore their replies were admissible.

With respect we are of the opinion he was right.

Section 15 of the Criminal Procedure Code provides:

"(i) In making an arrest the police officer ... making the arrest shall actually touch or confine the body of the person to be arrested unless there be a submission to the custody by word or action.
(ii) If such person forcibly resist the endeavour to arrest him or attempt to evade the arrest such officer ... may use all means necessary to effect the arrest."

In *Shaaban & Others* v. *Chong Fook Kam & Another*[17] Lord Devlin delivering the advice of the Privy Council said that a policeman does not make an arrest when he stops an individual to make enquiries. He said at page 220:

"An arrest occurs when a police officer states in terms that he is arresting or when he uses force to restrain the individual concerned. It occurs also when by words or conduct he makes it clear that he will, if necessary, use force to prevent the individual from going when he may want to go. It does not occur when he stops an individual to make enquiries."

Here there had been previous complaints that idols had been destroyed in Hindu temples in the area, the police had alerted this particular temple and advised that it should be guarded, when the Corporal and later other officers arrived at the temple as a result of the report by the two Indians they had arrived to investigate an attack on the temple, of which the applicants might be material witnesses, and in the circumstances, it was a matter for the A.S.P., not the Corporal, to decide whether or not the applicants should be arrested, as a corporal has no power to investigate a seizable offence but must await direction from his superiors (section 109 (1) of the Code). The corporal did not in terms state that he was arresting the applicants or use force to restrain them, nor did he make clear by words or conduct that he would, if necessary, use force to prevent the applicants from going where they might have wanted to go.

In our judgment the answer to this question depends on the facts of each individual case, but on the facts herein it cannot be said that the applicants had been arrested by the corporal when he told them to wait and not leave the temple, for he had merely stopped them to make enquiries into the attack on the temple.

Question 3

Mr. Vijandran submits that the answer to this question should be in the negative while Encik Mokhtar submits that it should be in the affirmative.

The answer to this question turns on the construction of section 113 of the Criminal Procedure Code which provides as follows:

"113. (1) Where any person is charged with any offence any statement, whether the statement amounts to a confession or not or is oral or in writing, made at any time, whether before or after the person is charged and whether in the course of a police investigation or not and whether or not wholly or partly in answer to questions, by that person to or in the hearing of any police officer of or above the rank of Inspector and whether or not interpreted to him by another police officer or other person shall be admissible in evidence at his trial and, if the person charged tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit:

Provided that

(a) no such statement shall be admissible or used aforesaid –
  (i) if the making of the statement appear to the court to have been caused by any inducement, threat or promise having reference to the charge proceeding from a person in authority and sufficient in the opinion of the court to give the person charged grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him; or
  (ii) in the case of a statement made by the person after his arrest, unless the court is satisfied that a caution was administered to him in the following words or words to the like effect:
  'It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, Whether in answer to a question or not, may be given in evidence'; and
(b) a statement made by any person before there is time to caution him shall not be rendered inadmissible in evidence merely by reason of no such caution having been administered if it has been administered as soon as possible.

(2) Notwithstanding anything to the contrary contained in any written law a person accused of an offence to which sub-section (1) applies shall not be bound to answer any questions relating to the case after any such caution as aforesaid has been administered to him."

For the purpose of this question the material words in subsection (1) read as follows:

"where any person is charged with any offence any statement, whether the statement is oral or in writing, made by that person to any police officer of or above the rank of Inspector shall be admissible in evidence at his trial."

Nothing could be clearer than these statutory words: a statement made by a person before his arrest to a police officer of or above the rank of Inspector is admissible even if is not reduced into writing. Such a statement is of course admissible only if it was made voluntarily (proviso (a) (i)) and if made after arrest the accused had been cautioned (proviso (a) (ii)) or, if he had not been cautioned, he was cautioned as soon as possible (proviso (b)).

However difficulty is caused by section 112 of the Code, which difficulty was considered by this court in *Abdul Ghani bin Jusoh* v. *Public Prosecutor*[18].

Before dealing with this difficulty, we should mention that the present section 113 was not enacted until 1976 by Act A334 of 1976; and that before that the general rule was that no statement made by an accused person to a police officer in the course of a police investigation shall be used in evidence, save for the very limited purpose set out in the old section 113. The new section brings our law into line with the law in England where the prosecution depends in many cases on statements made by an accused person to the police. Until the new provision a confession by an accused person in police custody was admitted by our courts only if made to a magistrate.

Before the amendment, by section 112(i) a police officer who examined a person supposed to be acquainted with the facts and circumstances of the case was required to reduce into writing any statement made by the person examined. Also, under the old section 113 this last person was prohibited from signing his statement.

Then when the new section 113 was enacted it was explicitly provided, as we have earlier noted, that even an oral statement made by him would be admissible, provided always that the various conditions set out in that section are satisfied; and subsection (i) of section 112 was left untouched.

Shortly after the amendment, in the same year Parliament further amended the Code by Act A365 adding a new

subsection (v) to section 112 reading:

"A statement made by any person under this section whether or not a caution has been administered to him under section 113(1) shall, whenever possible, be taken down in writing and signed by the person making it or affixed with his thumbprint as the case may be, after it has been read to him in the language in which he made it and after he has been given an opportunity to make any corrections he may wish."

In *Abdul Ghani bin Jusoh*[18] the case against both appellants relied largely on the admissibility of cautioned statements given by them. None of these statements had been signed or thumbprinted by the appellants, but that notwithstanding the learned trial judge ruled that they had been made voluntarily and admitted them. This court ruled otherwise, holding that the two sections 112 and 113 should be read together, that a cautioned statement is not admissible under section 113 if not signed or thumbprinted by the accused. Wan Suleiman, F.J., said at page 27:

"... the mischief this provision [subsection (v) of section 112] is obviously designed to prevent is the concocting or 'improving' of statements by recorders thereof. Affixing the maker's signature (or thumb impression) is the universal mode of signifying its authenticity and it would be reasonable to expect refusal by the person examined to so authenticate a statement which does not accord to what he had told the police."

In the next paragraph he added:

"It will be proper to assume that Parliament is aware of the state of the law prior to these amendments including the fact that section 112(i) had prior to the addition of [subsection (v)] already made it mandatory for the recording officer to 'reduce into writing any statement' made by the person examined. It therefore follows that the words 'whenever possible' in section 112(v) can only refer to the act of obtaining the signature or thumb impression of the person examined, and not to the clause 'to be taken down in writing', an act which has already been prescribed by the earlier subsection. It is not difficult to contemplate exceptional circumstances where a court may, on being satisfied as to the reason for failure to obtain these marks of authentication, yet allow such statement to be used for the purpose to which sections 112 and 113 allow them to be used."

It is in the light of the above provisions and *Abdul Ghani bin Jusoh*[18] that Mr. Vijandran submits that the answer to this question is in the negative.

With respect we think that *Abdul Ghani bin Jusoh*[18] is distinguishable. There the cautioned statements were rejected by this court not simply because they were oral statements; the statements had been reduced into writing but the court was not satisfied that they were authentic and their voluntariness was suspect, since, in the words of Wan Suleiman, F.J., at page 27:

"no adequate reason or indeed any reason whatsoever has been advanced for the failure to obtain the signature (or thumb print) of the accused on their respective statement."

It will be noted in *Abdul Ghani bin Jusoh*[18] the question before this court was whether or not a statement not signed or thumbprinted by the accused was admissible and the court answered the question in the negative in favour of the accused in the peculiar circumstances of that case; but that in other circumstances, if for instance there had been a reasonable explanation for the omission, it might have been admissible. That case did not deal with the question before us in the instant case, namely whether or not an oral statement is admissible.

In our judgment such a statement *is* admissible because of the words "whenever possible" in subsection (v) of section 112. With respect to Wan Suleiman, F.J., in *Abdul Ghani bin Jusoh*[18], in our view these words govern not only the words "and signed by the person making it or affixed with his thumb print as the case may be", but also the words immediately preceding them, namely "be taken down in writing" – so that in our view though there is an obligation on the Inspector or whoever recorded the accused's statement to reduce it into writing, failure to do so, if there is a reasonable explanation for such failure, does not by itself render it inadmissible. So to hold is to harmonize the seemingly conflicting provision in this subsection (v) of section 112 and subsection (1) of section 113; and to hold otherwise would be to render nugatory the clear provision in the latter subsection.

Thus, in our judgment, the answer to the third question is that an oral statement made by a person before his arrest to a police officer of or above the rank of Inspector can be admitted as evidence against him where the statement has not been reduced into writing, provided there is a reasonable explanation for the failure.

Questions answered.

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WADKIN LUMBER CO. v. LAWAS LUMBER SDN. BHD.

[F.C. (Lee Hun Hoe C.J. (Borneo), Salleh Abas and Abdul Hamid F.JJ.) June 16 & July 14, 1982]

[Kuching – Federal Court Civil Appeal No. 40 of 1981]

Contract – Agreement to extract timber from forest reserve – Breach of contract.

The respondent had exclusive rights to fell and extract timber in a number of forest areas. It entered into a logging agreement with the appellant for the purpose of extracting timber from a forest reserve. The appellant completed constructing a road linking the JKR road with the boundary of the forest reserve and it also transported for the respondent most of the roadside logs which were felled because of the road construction to the respondent's log pond. The appellant subsequently ceased work and left the area. It alleged that having completed the road to the boundary of the forest reserve it was entitled to be supplied with approved blocks for timber extraction and as the respondent had failed or delayed to supply the blocks this constituted a breach of the agreement. The respondent on the other hand denied the allegation of breach by it and alleged that it was the appellant who broke the agreement. It claimed that the appellant had not constructed the road in accordance with the agreement so as to satisfy the Forest Department and enable the permit to enter the reserve to be given.

The respondent maintained that the road to be built must be both outside and inside the Contract area and as the appellant had not completed the road construction it was in breach of the agreement. The learned trial judge accepted the respondent's contention and held that it was the appellant, not the respondent, who was in breach of the agreement. He held that the appellant was entitled to